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No. 00-1491

IN THE

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner John Deere Insurance Company submits this supplemental brief under Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the United States on January 3, 2002.

The brief of the United States substantially confirms petitioners' arguments in favor of plenary review by this Court. The brief makes clear that the Ninth Circuit's decision, and the Tenth Circuit's identical ruling in *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (1996), are incorrect, U.S. Br. at 9, illustrates that the reasoning of those decisions conflicts with that of four other courts of appeals, *id.* at 15, and agrees with petitioner that the erroneous rule may have significant practical consequences, *id.* at 18. In light of the considered views of the Solicitor General and the Department of Transportation, there is no reason to allow the decision below to stand. This Court should grant the petition and undertake plenary review or summarily reverse. At a minimum, the Court should follow the recommendation of the United States by granting the petition, vacating the judgment below, and remanding for reconsideration in light of the views of the Department of Transportation.

We write principally to address two suggestions made in the United States' brief: (1) that, while the courts of appeals decisions discussed in the petition are inconsistent in their reasoning, they might be distinguishable on certain factual grounds; and (2) that, while the decision below is clearly incorrect, its significance is somewhat unclear. As we explain below, the conflict in reasoning among the courts of appeals decisions leaves no room for consistent results, and the Ninth Circuit's decision below is of substantial significance.

1. Addressing the question for the first time in the brief filed by the United States in this matter, the Department of Transportation ("DOT") has decisively rejected the Ninth and Tenth Circuit's interpretation of the Form MCS-90 En-

dorsement ("MCS-90"). For reasons discussed at length in petitioner's opening and reply briefs, the United States and the DOT are correct, and the Ninth and Tenth Circuits are wrong. The reading of those Circuits ignores the statutes and regulations from which the MCS-90 derives, disregards the only plausible definition of the term "insured," and confuses the basic regulatory structure. U.S. Br. at 10-14. Given the fundamental errors in the Ninth Circuit's reasoning, and the fact that the agency responsible for administering the relevant statutes and regulations has flatly rejected its conclusion, the decision below should not be allowed to stand. This Court should either: grant the petition and set the case for argument and plenary consideration; summarily reverse the Ninth Circuit's opinion; or grant the petition, vacate the judgment, and remand for reconsideration in light of the DOT's analysis of the MCS-90.

2. The United States' brief makes clear that the Ninth Circuit's reasoning, like that of the Tenth Circuit in *Adams*, is irreconcilable with decisions of the D.C., Third, Fifth, and Eighth Circuits.

First, the United States agrees with petitioner that the D.C. Circuit's decision in *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597 (D.C. Cir. 1952) reflects a "proper understanding" of the MCS-90 and is "inconsistent with the Ninth Circuit's misinterpretation of that form in this case." U.S. Br. at 15. The United States notes factual distinctions between the cases, but these differences do not minimize the fundamental conflict that remains between them. Although *National Mutual* involved a dispute between insurers, and although the Ninth Circuit considered this a significant point, nothing in the opinion of the D.C. Circuit suggests that that court would consider this a salient distinction warranting a different result. The D.C. Circuit properly interpreted the I.C.C. endorsement and the underlying scheme, and there is no reason to think that a change in

the parties would lead it to reject that reasoning and to adopt a demonstrably incorrect rule disavowed by the DOT. After all, the definition of the word "insured" in the MCS-90 does not vary depending upon whether the dispute is between two insurers or between an insurer and a member of the public.[1]

Second, beyond the factual distinctions discussed with respect to *National Mutual*, the United States offers no additional reason to discount the square conflict between the reasoning of the Ninth Circuit and the Third Circuit's unqualified declaration that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the insurer] the duties to defend claims properly brought against others or to pay judgments entered against others." *Carolina Casualty Insurance Co. v. Insurance Company of North America, Inc.*, 595 F.2d 128, 139 (3d Cir. 1979). Because the Third Circuit recognizes that the relevant statute and regulations concerning "motor carriers' financial responsibility, require only that the carrier give security 'to pay any final judgment recovered against such motor carrier,'" and that the regulations say "nothing about payment of judgments recovered against other parties," *id.*, the factual distinctions cited by the United States would provide no principled basis

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[1] The United States also suggests that the D.C. Circuit might reach a different result because the I.C.C. endorsement at issue in *National Mutual* did not contain specific language that is now included in the MCS-90 and that the Ninth Circuit deemed "critical." *See* U.S. Br. at 16 (noting absence of phrase "regardless of whether or not each motor vehicle is described in the policy"). The United States' argument is incorrect. Although the D.C. Circuit did not quote the cited language, *see* 196 F.2d at 599-600, substantially the same phrase did appear in the I.C.C. endorsement then in effect. *See Commercial Standard Ins. Co. v. Robertson*, 159 F.2d 405, 407 (6th Cir. 1947) (quoting language from then-applicable I.C.C. endorsement, including the phrase "regardless of whether such motor vehicles are specifically described in the policy or not"). Thus, the language that the Ninth Circuit deemed "critical" was in fact before the D.C. Circuit. That court's omission of the phrase shows that it did not find that language "critical" to the underlying legal issues, and therefore underscores the basic conflict with the Ninth Circuit.

for the Third Circuit to adopt the discredited reasoning of the Ninth and Tenth Circuits.

Third, though *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), and *White v. Excalibur Insurance Co.*, 599 F.2d 50, 55 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979), did not directly address the text of the MCS-90, those decisions both held that, under the statute from which that endorsement derives, an insurer may be held liable only upon the entry of judgment against the motor carrier named in its insurance policy. This ruling, in cases involving injured members of the public, was essential to the holding of each case, and there is simply no reason to doubt that the Eighth and Fifth Circuits would adhere to their carefully considered views. Indeed, the Fifth Circuit recently reiterated a view of the MCS-90 that flatly conflicts with that of the Ninth Circuit. In *Jackson v. O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996), the court described the obligation imposed by the MCS-90 as follows: "Under the Endorsement, Canal [the insurer] undertook to pay any final judgment rendered against J & T Enterprises [the named insured motor carrier]." That characterization confirms that the Fifth Circuit's understanding of the MCS-90 is well-settled and in stark conflict with that of the Ninth Circuit. There is simply no reason to expect that conflict to disappear without the intervention of this Court.

At bottom, the United States recognizes that the cases cited in the petition turn on reasoning inconsistent with the basic analysis of the Ninth Circuit in the case below and the Tenth Circuit in *Adams*. As discussed above and in petitioner's prior submissions, that reasoning is not incidental to the cited cases, and the distinctions noted by the United States do not provide credible grounds for those courts to reject their prior holdings in favor of the views of the Ninth and Tenth Circuits.

3. Although the United States agrees with petitioner that the sheer number of MCS-90 endorsements and accidents involving covered vehicles suggests that the Ninth Circuit's error may arise frequently, it maintains that the "importance of the error is unclear." U.S. Br. at 18. The United States bases this conclusion, at least in part, upon its perception that the precise issue presented has not been litigated with great frequency, and its assumption that the number of past cases is a meaningful indicator of the number of cases likely to arise in future. Petitioner respectfully submits that both the perception and the assumption are mistaken.

Since 1995, at least 26 reported federal opinions, and least 18 reported state opinions, have addressed the proper interpretation of the MCS-90. Among these cases, the exact question presented here – whether a party other than the insured motor carrier is an "insured" under the MCS-90 – has arisen frequently, and formed the basis for a number of decisions. *See Miller v. Harco National Ins. Co.*, 241 F.3d 1331, 1333-34 (11th Cir. 2001) (certifying state law question to Georgia Supreme Court after district court dismissed claim against insurer because judgment had been entered against a related party rather than the named insured carrier); *Adams*, 99 F.3d at 970; *Pierre v. Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001); *St. Paul Fire & Marine Ins. Co. v. Newman*, No. CIV 99-645-AH-C, 2000 WL 1367980, at * (S.D. Ala. Sept. 5, 2000) (adopting alternative argument that "while the regulations require and the MCS-90 endorsement provides coverage for . . . the authorized carrier, the regulations do not extend coverage to [the owner-operator]"); *Lynch, ex rel. Wiley v. Yob*, No. 99-T-062, 2000 WL 1804347, at *2 (Ohio Ct. App. Dec. 8, 2000) (holding that "because neither the owner of the tractor nor the driver fit the definition of 'insureds,' it was error for the trial court to conclude that the MCS-90 endorsement somehow created coverage by broadening the definition of an 'insured.'"); *Madere v. National Union Fire Ins. Co.*, No. CIV.A. 98-

3249, 2000 WL 1593441, at * 8 (E.D. La. Oct. 24, 2000) (holding, in the alternative, that insurer's obligation under the MCS-90 could be triggered by entry of judgment against parties other than the named insured motor carrier); *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 113 (Tx. Ct. App. 1997) (holding that the motor carrier, not is driver, is an "insured" under the MCS-90); *John Deere Ins. Co. v. Truckin' USA*, No. CIV.A.3:95-CV-1556-D, 1996 WL 734952, at *4 (N.D. Tex. Dec. 10, 1996) (holding that the "'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy"), *aff'd on other grounds*, 122 F.3d 270 (5th Cir. 1997); *Kesler v. Thedford*, 670 So. 2d 467, 471 (La. Ct. App. 1996) (upholding dismissal of insurer because "the motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement.").

Taken together, these cases make clear that the question presented here arises with considerably frequency, and that the Ninth Circuit's erroneous holding is therefore quite significant. Moreover, the number of cases decided prior to the Ninth Circuit's ruling does not accurately predict the number of cases that are likely to follow it. Before this case, only the Tenth Circuit had taken the view that the MCS-90 could amend the terms of the policy to which it is attached. Because other courts had soundly rejected that position, plaintiffs outside that circuit were likely to take the cautious approach of preserving their claims by suing all possible defendants, including the named insured carriers. But the Ninth Circuit's ruling is likely to provoke the kind of strategic conduct discussed in the petition, Pet. at 26-28, and therefore to spawn much more litigation of this issue.

4. The United States suggests that the Ninth Circuit's error could "be fixed through a regulatory proceeding before the [DOT]." U.S. Br. at 19. But the fact that a court's error may in theory be corrected through regulatory proceedings is no reason for this Court to deny plenary review. Indeed, the availability of relief through regulatory revision has never been an obstacle to review by this Court, which routinely grants petitions for certiorari in cases presenting questions concerning the proper interpretations of federal regulations.

It is entirely appropriate to allow litigants to seek and obtain review by this Court, for regulatory revision would entail a lengthy and costly process that is not certain to yield tangible results. The DOT has taken the position that the underlying regulations are clear and that the meaning of the MCS-90 is apparent from the face of the document, U.S. Br. at 10-13, and therefore may not see the need to revise or clarify its statutory scheme. Moreover, clarification of the MCS-90 through the regulatory process on a prospective basis would not lift the burden of the Ninth Circuit's erroneous ruling for petitioner and other parties now subject to liability thereunder. In short, the fact that an interested party could petition the DOT to revise or clarify the MCS-90 and its accompanying regulations should not deter this Court from granting review to resolve this glaring and important error expeditiously.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the Court should grant the petition and undertake plenary review. In the alternative, the Court should grant the petition and summarily reverse the Ninth Circuit, or vacate the judgment below and remand for further consideration in light of the views of the DOT.

Respectfully submitted,

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